IN THE LABOUR COURT OF LESOTHO

CASE NO LC 32/99

HELD AT MASERU

IN THE MATTER OF:

MPESHE MICHAEL MOREMOHOLO **APPLICANT**

AND

MOHALE TUNNEL CONTRACTORS **RESPONDENT**

JUDGMENT

This is an action in which applicant is seeking reinstatement and payment of arrears of salary from the purported date of dismissal to the date of reinstatement. The applicant was employed by the respondent on the 8th September 1998 as plant and motor mechanic. The employment was subject to successful completion of three months probation. On the 14th December 1998 the applicant was dismissed and paid his terminal benefits.

The applicant approached the Labour Department for assistance. Meetings were held between Mr. Mako of the Labour Department and respondent's Mr. Linger Fielder. Mr. Mako's finding was that the respondent had not followed its procedure. He accordingly recommended that applicant "….be reinstated and disciplinary enquiry be conducted properly." Thereafter the respondent and Mr. Mako entered into several exchange of letters which never resolved the dispute until in August 1999 when the applicant decided to bring this dispute to court for final determination.

It is common cause that when this case was filed on the 12th August 1999 the six months period within which claims for unfair dismissal must be presented to court had since lapsed. Thus in paragraphs 4(i)-(k) of his Originating Application the applicant prayed for the condonation of the late filing of this matter as he had "….endeavoured to exhaust local remedies by going through the dispute resolution machinery established by the Labour Code." In their Answer the respondent did not oppose the application but merely averred that they had no comments. In our view this was a clear sign that the respondent was in agreement that the applicant

had not just sat back and not prosecuted his case until it was out of time. The respondent was confirming albeit by conduct that the matter had been attempted to be settled out of court through the Labour Department's mediation efforts. In our view the applicant has shown good cause why he delayed, accordingly his application for condonation should as it is hereby done be granted.

Applicant contends that he is entitled to bring this application in as much as he had already completed his three months probation. He contends further that his dismissal is in conflict with Section 66(4) of the Labour Code Order 1992 (the Code) in that he was never afforded natural justice prior to his dismissal. Lastly he contends that his purported dismissal in terms of Section 75 of the Code is null and void in as much as that section does not authorize respondent to dismiss him.

Respondent's answer to these averrements was that applicant was dismissed in terms of Section 75 of the Code which provides that;

> ***"An employee may initially be employed for a probationary period not exceeding four months. At any time during the continuance of the probationary period or immediately at its end, the employee may be dismissed with one week's notice."***

It was respondent's further contention that applicant was afforded an opportunity to be heard in accordance with the rules of natural justice, which hearing was in the form of performance appraisal. The respondent averred further that at the end of each such appraisal a performance appraisal report was produced which applicant refused to sign. Five such reports were attached to the Answer as Annexure 1.

Applicant himself testified in support of his claims in the Originating Application. The gist of his testimony was that he was never afforded a hearing prior to dismissal. He further denied ever being appraised during his probation or refusing to sign any appraisal forms. The respondent called Mr. Paseka Leqheku who testified that one day in or around November 1998 one Mr. Simon Starke came into his office with applicant. He (Mr. Leqheku) was with Mr. Seele Leboela (since deceased) in that office. Mr. Starke sought the assistance of Mr. Leboela to explain to applicant about the paper he (Mr. Starke) was holding. The witness says that paper appeared to him to be a performance appraisal form. The witness stated that when Leboela approached the applicant and Starke at another table, the applicant called to him (i.e. the witness) and invited him to come and help him hear out the case. He says applicant told him that he was being made to sign a paper he does not know.

During cross-examination Mr. Mosito for the applicant brought to the attention of respondent's witness that what he said about the applicant was never put to him i.e. the applicant while he was in the witness box. Indeed the allegations ascribed to the applicant by Mr. Leqheku in his evidence, may well be true. Infact Mr. Leqheku

himself appeared a frank and honest person. However, to accept the things he said about the applicant without the latter having had the opportunity to rebut them would be most unfair to applicant and would certainly result in the miscarriage of justice.

The issues for the determination of this court are in our view two. These are namely; whether the applicant is entitled to institute these proceedings and if so whether the applicant was afforded the opportunity to be heard before dismissal.

<u>Is Applicant Entitled To Bring These Proceedings</u>

Section 71(1) of the Code provides:

> ***"(1) Subject to sub-section (2), the following categories of employees shall not have the right to bring a claim for unfair dismissal;***
> ***"(a) employees who have been employed for a probationary period, as provided under Section 75."***

It is respondent's case that the applicant was dismissed at the end of his probation as he had been an unsatisfactory employee. Mr. Mosito for the applicant contended that the applicant was wrongly dealt with in terms of Section 75 because he had completed his probation period.

Section 75 of the Code says "at any time during the <u>continuance</u> of the probationary period or <u>immediately</u> at its end, the employee may be dismissed with one week's notice." We have underlined the words "continuance" and "immediately" to show that Section 75 applied either during probation or when the contract is terminated immediately at its end. It is common cause that applicant's last day of probation was to be the 7th December 1998. This would be the day the three months probation ends.

In his evidence applicant said he was dismissed on the 14th December 1998. This was never denied. In his arguments Mr. Mosito ventured to suggest that the date of applicant's termination was infact common cause. Again this was not denied. Miss Sephomolo sought to convince us that this was so because the applicant was serving his one week's notice. This is sheer speculation. There is no evidence to sustain it. If anything at all it is clear that applicant was infact paid one week's salary in lieu of notice. This applicant was asked under cross-examination and he confirmed that he was paid a week's salary in lieu of notice. Annexure "A" to the Originating Application is an undated letter written on respondent's letter heads by one Ananias. It says Mr. Moremoholo's "…contract was terminated on completion of his probationary period." In our view no importance can be attached to this letter as the Ananias who signed it does not say in what capacity he wrote the letter and to who.

Annexure "C" to the Originating Application is the certificate of service for the applicant. It says applicant worked for respondent from 8th September to 8th December 1998. The contents of this document regarding the last day of applicant's employment are at variance with the uncontroverted evidence before this court which is that applicant was dismissed on the 14th December 1998. We cannot but conclude that the date of 8th December is the imagination of the author of the certificate of service. Our finding is therefore, that the applicant completed his probation on the 7th December. Having not been dismissed at the end of that probation period, Section 75 no longer applied to the termination of his contract on the 14th December when he was dismissed. By the same token he no longer fell under excluded categories in terms of Section 71(1)(a) of the Code.

Was Applicant Given A Hearing

The respondent's contention was that the applicant was given a hearing by way of performance appraisal at the end of which a report was made. Mr. Mosito submitted correctly in our view that the performance appraisal reports annexed to the Answer are hearsay.

No witness was called to testify on them and to formally hand them in. We are left with applicant's testimony which in the light of our finding is uncontradicted. This testimony is that he was never subjected to any performance appraisal during his probationary period. We have no reason for disbelieving this testimony. It is accordingly accepted as the correct version. It is to be noted that the foregoing would have been the finding if the applicant had been terminated immediately at the end of the probationary period. It is only then that the performance appraisals might be given some value in respect of the audi alteram partem principle. However, as we found the applicant was dismissed well after he completed his probationary period. He therefore, was entitled to a hearing in terms of Section 66(4) of the Code. By their own admission, the respondents did not afford the applicant that opportunity to be heard because they thought they had satisfied that requirement through performance appraisals. It goes without saying that the applicant was not heard before he was dismissed.

Did The Respondent Comply With Its Code

One point which, though not formally raised in the Originating Application is implicit in the papers is that the respondent did not comply with its code. Mr. Mako in his correspondence made this clear. We find this a relevant point as an alternative issue. That is assuming that this court is wrong in saying that Section 75 of the Code was wrongly relied upon in dismissing the applicant because he had completed his probation. We now address the issue whether the applicant's dismissal is fair if he was correctly terminated in terms of Section 75. Clause 2.2 of the contract of employment of the applicant provides that;

> ***" a notice period of 1(one) week may be given by either the company or the employee to terminate service during the first three months of service should the person fail his/her probationary period. In the event of the company terminating the employment the Disciplinary Code will apply."***

It is common cause that in casu it is the company that terminated the employment, accordingly the disciplinary code applied.

The respondent's Disciplinary Code and Procedure provides for a three tier procedure. The first step is the informal stage, where the employee is verbally warned and counseled. The second step is the start of formal disciplinary action. Here the employee is given a written warning. The employee's transgression, required behaviour or performance is/are clearly recorded by the supervisor. The employee is asked to explain his action and his reply is recorded. The last step is disciplinary enquiry which is to be held by the appropriate manager. Ms Sephomolo was asked by the court if the respondent followed this procedure. She answered honestly and said it was not followed. It is the respondent that imposed this obligation on itself and it must therefore comply with it. The applicant justifiably expected that his employment could not be interfered with otherwise than through the observance of these noble procedural steps. To do otherwise as was the case herein constituted an unfair dismissal.

<u>AWARD</u>

The applicant is seeking reinstatement, alternatively payment of arrears of salary from date of purported dismissal to date of judgment and payment of compensation. Even if the respondent may have bungled the procedure and misinterpreted the law, its averrements that applicant's performance during his probation period was unsatisfactory cannot be ignored. Accordingly it will not be fair to impose the applicant on the respondent which has made it very clear that he does not meet the expected standard of performance. We therefore are left with the option of ordering compensation.

In awarding compensation the Court is to take into account whether the employee has taken reasonable steps to mitigate his loss. In his evidence in chief the applicant was asked where he had been since he was dismissed by the respondent. His reply was "I have been at my home." He was asked what he was doing at home he said he was trying to get employment without success. No specific step was singled out which applicant took to look for a job, or particular employer who was approached. We are not satisfied that applicant took reasonable steps to mitigate his loss. In the circumstances we are of the view that his compensation should take account of this fact. Accordingly it is ordered that the respondent pays applicant six months salary as compensation. There is no order as to costs.

THUS DONE AT MASERU THIS 6TH DAY OF JUNE, 2000.

L.A LETHOBANE
PRESIDENT

C.T. POOPA
MEMBER **I AGREE**

M.S. MAKHASANE
MEMBER **I AGREE**

FOR APPLICANT : **MR MOSITO**
FOR RESPONDENT: **MS SEPHOMOLO**